

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 IN RE EX PARTE
12 APPLICATION OF JAMES F.
13 RIGBY, JR., CHAPTER 7
14 TRUSTEE OF THE ESTATE OF
15 MICHAEL R. MASTRO

16 Applicant.

CASE NO. 13cv0271-MMA (MDD)

ORDER GRANTING *EX PARTE*
APPLICATION FOR ORDER
PURSUANT TO 28 U.S.C. § 1782

[ECF. No. 1]

17
18 On February 1, 2013, James R. Rigby, Jr., the Chapter 7 Trustee of
19 the Estate of Michael R. Mastro, (“Applicant” or “Trustee”) filed an Ex
20 Parte Application for an Order Pursuant to 28 U.S.C. § 1782 Granting
21 Leave to Obtain Discovery from Michael K. Mastro for Use in Foreign
22 Proceedings. (ECF No. 1). The Applicant seeks permission to subpoena
23 Mr. Mastro for deposition regarding a dispute pending in France.

24 According to the Application, Michael K. Mastro is the son of
25 Michael R. Mastro. An involuntary bankruptcy petition was filed
26 regarding Michael R. Mastro’s business in 2009. In 2011, the Honorable
27 Marc Berreca of the United States Bankruptcy Court for the Western
28 District of Washington found that Michael R. Mastro and his wife had

1 made false and fraudulent representations and fraudulently transferred
2 assets. Judge Barreco ordered the arrest of Michael R. Mastro and his
3 wife in July 2011. They were arrested in France on October 24, 2012. A
4 federal indictment charging them with bankruptcy fraud and money
5 laundering was entered on October 25, 2012.

6 The Application further reports that in November 2012, the
7 Trustee obtained an order from the district court in Annecy, France,
8 authorizing the bailiff of that court to take possession of and inventory
9 all of the documents and property found at the home of Michael R.
10 Mastro and his wife in France. In December 2012, Michael R. Mastro,
11 his wife, and Michael K. Mastro filed a petition in the French court
12 seeking, among other things, return of certain personal property.

13 Michael K. Mastro resides in the Southern District of California.

14 I. LEGAL STANDARD

15 A district court may grant an application pursuant to 28 U.S.C. §
16 1782 where: (1) the person from whom the discovery is sought resides or
17 is found in the district of the district court to which the application is
18 made; (2) the discovery is for use in a proceeding before a foreign
19 tribunal; and, (3) the application is made by a foreign or internal
20 tribunal or any interested person. *See, e.g., Lazaridis v. International*
21 *Centre for Missing and Exploited Children*, 760 F.Supp.2d 109, 112
22 (D.D.C. 2011).

23 Even if these requirements are met, a district court retains the
24 discretion to deny the request. *Intel Corp. v. Advanced Micro Devices,*
25 *Inc.*, 542 U.S. 241, 264 (2004); *In re Premises Located at 840 140th*
26 *Avenue., N.E., Bellevue, Wash.*, 634 F.3d 557, 563 (9th Cir. 2011). The
27 Supreme Court, in *Intel*, identified several factors that a court should
28 consider in ruling on a request under § 1782:

1 “(1) whether the material sought is within the foreign
2 tribunal's jurisdictional reach and thus accessible absent
3 Section 1782 aid;

4 (2) the nature of the foreign tribunal, the character of the
5 proceedings underway abroad, and the receptivity of the
6 foreign government or the court or agency abroad to U.S.
7 federal-court jurisdictional assistance;

8 (3) whether the Section 1782 request conceals an attempt to
9 circumvent foreign proof-gathering restrictions or other
10 policies of a foreign country or the United States; and,

11 (4) whether the subpoena contains unduly intrusive or
12 burdensome requests.”

13 542 U.S. at 264-65.

14 II. DISCUSSION

15 A. Authority to Issue Subpoena

16 Having reviewed the application, the Court finds that the statutory
17 requirements have been satisfied. Mr. Mastro resides in the Southern
18 District of California, there is a pending proceeding in a French court
19 and the Trustee is an “interested party” as he is a party to the litigation
20 in France.

21 B. Discretionary Factors

22 1. Jurisdictional Reach of Foreign Tribunal

23 The Supreme Court, in *Intel*, stated that,

24 when the person from whom discovery is sought is a
25 participant in the foreign proceeding ..., the need for § 1782(a)
26 aid generally is not as apparent as it ordinarily is when
27 evidence is sought from a nonparticipant in the matter
28 arising abroad. A foreign tribunal has jurisdiction over those
appearing before it, and can itself order them to produce
evidence. In contrast, nonparticipants in the foreign
proceeding may be outside the foreign tribunal's
jurisdictional reach; hence, their evidence, available in the
United States, may be unobtainable absent § 1782(a)
aid.

542 U.S. at 264.

Mr. Mastro is a party to the French lawsuit so this factor may
weigh against granting the application. The Trustee asserts, however,

1 that French civil procedure does not include a discovery process
2 adequate to the task. (ECF No. 1 at 6). Specifically, the Trustee asserts
3 that French procedure requires that the party seeking discovery needs to
4 identify the precise document sought for production. (*Id.*). The
5 application does not address the availability of depositions in French
6 civil procedure. Although § 1782 does not have an “exhaustion”
7 requirement, the Court is permitted, in deciding how to exercise its
8 discretion, to consider whether the applicant has availed itself of
9 discovery procedures in the foreign forum. *See In re Degitechnic*, 2007
10 WL 1367697 at *4 (W.D.Wash. 2007). Here, there is a lack of clarity on
11 the issue of whether the jurisdictional reach of the French court extends
12 to depositions. Due to the lack of clarity, the Court finds that this factor
13 weighs against granting this application.

14 **2. Nature and Receptivity of Foreign Tribunal**

15 The Trustee has made a sufficient showing that the French courts
16 would be receptive to the introduction of evidence obtained pursuant to
17 § 1782. Consequently, this Court views this factor as favoring the
18 Applicant.

19 **3. Attempt to Circumvent Foreign Proof-Gathering** 20 **Restrictions and Policies**

21 Applicant claims to be “unaware of any restrictions on proof-
22 gathering that would prohibit obtaining the discovery it seeks through
23 Section 1782.” (ECF No. 1 at 8). As discussed above, however, the
24 Trustee has not addressed the availability of party depositions in the
25 French proceeding. So, while there is no evidence that the Trustee is
26 seeking to circumvent restrictions that may exist in the host court, this
27 factor does not help to convince the Court to exercise its discretion in
28 favor of the Applicant.

